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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

ROBERT W. CLOUGH II, on behalf
of himself and others similarly
situated,

Plaintiff,

v.

PLYMOUTH ROCK ASSURANCE
CORPORATION and AVENGE DIGITAL,
LLC,

Defendants.

* * * * *

20-cv-345-LM
October 13, 2020
9:35 a.m.

TRANSCRIPT OF MOTION HEARING
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

Appearances:

For the Plaintiff:

Edward A. Broderick, Esq.
Broderick & Paronich PC

Roger B. Phillips, Esq.
Phillips Law Office

For the Defendants:

Joseph M. Cacace, Esq.
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Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
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Concord, New Hampshire 03301
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1 P R O C E E D I N G S

2 THE CLERK: For the record, this is a motion
3 hearing in civil case 20-cv-345-LM, Clough vs. Plymouth
4 Rock Assurance Corporation, et al.

5 THE COURT: All right. Good morning,
6 everybody. It's good to see you.

7 Let me just have you go ahead and state your
8 name and who you represent, just for the record.

9 MR. PHILLIPS: Roger Phillips, local counsel
10 for the plaintiff, Robert W. Clough.

11 MR. BRODERICK: Good morning, your Honor.
12 Edward Broderick, also for the plaintiff.

13 MR. CACACE: Good morning, your Honor.
14 Joseph Cacace for the defendants, Plymouth Rock
15 Assurance Corporation and Avenge Digital.

16 THE COURT: Excellent. All right.

17 Okay. Well, this is your motion to dismiss
18 and it's based on 12(b)(2) and 12(b)(6). And so what
19 I'd like to do is start with the 12(b)(2) argument
20 and -- and then move on to 12(b)(6) and sort of take
21 them separately, hear argument from both of you -- all
22 of you, if need be -- on each motion.

23 Let me just start with the standard of review
24 and just make sure we're in agreement with respect to
25 the standard of review that applies to this motion.

1 So we've got -- the 12(b)(2) is a little
2 trickier than 12(b)(6), so let me just start with the
3 easier one, the 12(b)(6) standard we all know, we're
4 very familiar with.

5 I must accept the factual allegations in the
6 complaint as true and construe reasonable inferences in
7 the plaintiff's favor and determine whether the factual
8 allegations in the plaintiff's complaint set forth a
9 plausible claim upon which relief may be granted.

10 A claim is facially plausible when the
11 plaintiff pleads factual content that allows the Court
12 to draw the reasonable inference that the defendant is
13 liable for the misconduct alleged.

14 So any disagreement with the generic standard
15 for 12(b)(6) that I just laid out? Anything else, any
16 more meat on the bones, with respect to the standard of
17 review?

18 MR. CACACE: No disagreement here, your Honor.
19 That's -- I think that's sufficient.

20 MR. BRODERICK: None for plaintiff either,
21 your Honor.

22 THE COURT: Okay. All right.

23 Now, 12(b)(2), I just want to make sure --
24 it's a little trickier, but basically, under 12(b)(2),
25 the plaintiff is going to bear the burden of

1 establishing that jurisdiction exists.

2 Where I am not -- no one's asking for an
3 evidentiary hearing. I'll be applying the prima facie
4 standard today. Anybody disagree with the applicability
5 of the prima facie standard today?

6 MR. CACACE: No, your Honor.

7 MR. BRODERICK: No.

8 THE COURT: Okay.

9 MR. BRODERICK: No, your Honor.

10 THE COURT: All right. And to make a prima
11 facie showing, plaintiff must proffer evidence that's
12 sufficient to support finding all the facts essential to
13 personal jurisdiction and may not rely on unsupported
14 allegations.

15 The Court must accept plaintiff's properly
16 documented evidentiary proffers as true and construe
17 them in the light most favorable to plaintiff's
18 jurisdictional claim.

19 However, I do not need to credit conclusory
20 allegations or draw farfetched inferences as I weigh the
21 prima facie case.

22 I don't sit as a fact finder. I ascertain
23 only whether the facts duly proffered, fully credited,
24 support the exercise of personal jurisdiction.

25 Anybody disagree with the standard with

1 respect to 12(b)(2) prima facie case?

2 MR. CACACE: No, your Honor.

3 MR. BRODERICK: No, your Honor.

4 THE COURT: Okay. Now, personal jurisdiction.
5 So we've got 12(b)(2). Let's start with 12(b)(2) and
6 hear arguments with respect to that. We agree on the
7 prima facie case and the standard of review here. No
8 one's arguing general jurisdiction. You're asserting
9 specific jurisdiction; is that correct?

10 MR. BRODERICK: Correct, your Honor.

11 THE COURT: Okay. And we all know that at
12 least, the law is fairly well established there. The
13 cause of action must arise directly out of or relate to
14 the defendant's forum-based contacts.

15 And then we look at three elements -- and I
16 won't go into great detail on these because I know
17 counsel's familiar with them -- but the three elements
18 are relatedness, purposeful availment and
19 reasonableness, the Gestalt factors, fundamental
20 fairness.

21 So I'll be looking for, you know, sufficient
22 proffers with respect to those three elements.

23 And let me hear from Attorney Cacace.

24 MR. CACACE: It's Cacace.

25 THE COURT: Cacace. Thank you.

1 MR. CACACE: Thank you, your Honor.

2 Yeah. So I think it's appropriate to have
3 started with the standard of review because it is the
4 plaintiff's burden here to establish jurisdiction. The
5 plaintiff has the burden of proof and plaintiff hasn't
6 met that burden.

7 What plaintiff is doing is relying on
8 unsupported allegations in the complaint, which the
9 cases are clear -- we've cited cases to this effect --
10 that the plaintiff simply cannot do that, particularly
11 whereas here we have put in actually now two
12 declarations supplementing sort of, you know, the dearth
13 of jurisdictional facts in the complaint. And those
14 affidavits that we've put in are unrebutted and
15 undisputed, that there are no contrary affidavits or any
16 contrary evidentiary proffers.

17 And so, really, what this comes down to is
18 that neither defendant purposely directed any conduct
19 toward New Hampshire at all. That's the key linchpin
20 here.

21 And so just to sort of -- I think just a
22 little bit of housekeeping and then background from the
23 facts set forth in the two declarations is important.

24 So, first, Plymouth Rock Assurance Corporation
25 is not the proper party. We've said that in a

1 declaration and dropped a footnote I think in every
2 filing -- every pleading that we've filed. That entity
3 actually has no known relationship with Avenge Digital
4 at all. No contact or relationship with the plaintiff.

5 Plymouth Rock Management Company of
6 New Jersey, however, is the legal entity that had a
7 contractual relationship with Avenge Digital. That
8 company is based in -- headquartered in and incorporated
9 in New Jersey.

10 Now, I know we're not dealing with general
11 jurisdiction, so as for specific jurisdiction, the
12 declaration, particularly the supplemental declaration
13 of Mr. Baumgartner from Plymouth Rock, makes a few
14 things clear that I think are dispositive when -- in
15 terms of personal jurisdiction here.

16 So, first, the auto insurance marketing
17 campaign that was being done when the plaintiff alleges
18 that he was called was restricted to New Jersey drivers
19 only. There were no New Hampshire -- Plymouth Rock
20 Management Company of New Jersey was not selling and was
21 not trying to sell policies to New Hampshire drivers,
22 was not calling New Hampshire, was calling New Jersey to
23 issue New Jersey policies.

24 None of the affiliated companies that were
25 selling insurance policies -- none of the companies

1 affiliated with Plymouth Rock Management Company of
2 New Jersey was selling insurance policies in
3 New Hampshire. It just really had nothing to do with
4 New Hampshire.

5 Second, Plymouth Rock -- actually, neither
6 defendant called -- called the plaintiff. It was a
7 third-party intermediary and the call got transferred
8 and ultimately ended up with Plymouth Rock of New Jersey
9 who, again, did not initiate the call. Call came in and
10 then the individual on the call, who is the plaintiff
11 here, identified himself falsely as Robert Phillips,
12 gave an address in Kinnelon, New Jersey, said he had a
13 valid New Jersey driver's license, all of which is true
14 about a different individual named Robert Phillips in
15 Kinnelon, New Jersey, but not the plaintiff who
16 represented these things to Plymouth Rock Management
17 Company of New Jersey.

18 New Hampshire was not mentioned on the call at
19 all. So, really, none of this has anything to do with
20 New Hampshire. This is a New Jersey marketing campaign
21 and everything that the plaintiff said on the call that
22 he had -- the only call that he had with Plymouth
23 Rock -- suggested that he was a New Hampshire resident,
24 had a New Hampshire driver's license -- or, sorry,
25 New Jersey -- New Jersey resident with a New Jersey

1 driver's license. Nothing -- nothing at all about
2 New Hampshire.

3 Even without that, however, even without all
4 of those critical and I think dispositive jurisdictional
5 facts, the complaint itself just isn't -- isn't
6 sufficient. The complaint itself doesn't allege any
7 purposeful availment into New Hampshire by either
8 defendant.

9 There's -- there's no allegation that either
10 defendant knew where the plaintiff was located when he
11 was called, where he resided, or actually even the area
12 code of his cellular telephone number that he claims
13 that he was called on. So there really just aren't
14 enough allegations here.

15 And if I could just make a couple of quick
16 points with respect to each defendant.

17 As to Avenge Digital, the -- really, the key
18 allegation in the complaint is that Avenge made or
19 caused to be made the illegal telemarketing calls at
20 issue to be sent into this district.

21 But, again, there's no allegation that
22 plaintiff's cell phone number had a New Hampshire area
23 code or that Avenge knew that it did or that Avenge knew
24 where he was located. There's no purposeful direction
25 at all towards New Hampshire, particularly in light of

1 what we know from the declaration submitted by
2 Mr. Baumgartner.

3 The case law, and this is Supreme Court case
4 law, is clear that the plaintiff cannot be the only link
5 between the defendant and the forum state. And that is,
6 at most, what we have here.

7 As to Plymouth Rock, the linchpin allegation
8 is that Plymouth Rock offered its insurance services to
9 the plaintiff in this district, including by making
10 additional efforts to contact the plaintiff directly to
11 sell and service this following the initial
12 telemarketing calls.

13 So there's not -- there's no allegation that
14 Plymouth Rock actually called into the -- called into
15 New Hampshire. It -- the allegation is that it offered
16 insurance services once Plymouth Rock spoke to the
17 plaintiff.

18 The TCPA violations, though, don't arise out
19 of that. They don't arise out of offering insurance
20 services or giving an insurance quote to him. They
21 arise out of the call with Plymouth -- which Plymouth
22 Rock had nothing to do with.

23 Again, plaintiff doesn't allege that Plymouth
24 Rock made the calls to New Hampshire, doesn't allege
25 that they directed Avenge or any other party to call

1 New Hampshire or even knew that they would be making
2 calls to New Hampshire. And, again, the --
3 Mr. Baumgartner's affidavit makes vivid this was all
4 about New Jersey.

5 And, finally, you know, Avenge's conduct
6 cannot be imputed to Plymouth Rock here on an agency
7 theory for personal jurisdiction. We submitted the
8 contract between the two which has a provision that
9 makes clear that Plymouth Rock -- that it is not an
10 agency contract; that Avenge Digital is an independent
11 contractor, not an agent of Plymouth Rock. There's no
12 apparent or actual authority here and Plymouth Rock did
13 not ratify any alleged in-forum conduct, including, you
14 know, calling into New Hampshire.

15 So at the end of the day, this -- this case
16 just doesn't involve any -- any purposeful availment of
17 New Hampshire, any direction towards New Hampshire.
18 It's all about New Jersey.

19 THE COURT: All right. Attorney Broderick.

20 MR. BRODERICK: Your Honor, I think the -- the
21 personal jurisdiction argument really merges with the
22 agency allegations and whether the agency allegations
23 are sufficient. Because as we cited in our papers, the
24 First Circuit is very clear that, actually,
25 jurisdictional context of an agent may be imputed to a

1 principal.

2 So it -- it's more of a question of have we
3 sufficiently alleged the agency relationship than of --
4 there's not a separation between Plymouth Rock for
5 jurisdictional purposes and the calling into
6 New Hampshire.

7 The other thing I want to make clear is this
8 is a 603 area code. We didn't list the entire number
9 because, you know, for privacy purposes, but it -- he
10 does have a 603 number and is -- is a New Hampshire
11 resident.

12 So that alone is enough to say, look, if
13 you're directing a call to someone on a 603 number, for
14 jurisdictional purposes, you don't need to know exactly
15 where that person is going to answer the phone,
16 particularly in the case of a cellular phone, where you
17 could be anywhere. If you're calling a 603 number,
18 you're certainly calling a New Hampshire resident.
19 That's you're -- that's -- that's what you would -- I
20 can't understand any other -- any other understanding of
21 what -- where you're calling.

22 You know, there would be nowhere you could sue
23 someone under their theory because they never know where
24 they're -- where they're availing themselves of. They
25 could only be sued in their forum state.

1 So I would look back to the adequacy of the
2 agency allegations. And it's -- it's not required that
3 they actually knew what was happening; it's they knew or
4 should have known that this conduct was going on.

5 And they -- the -- the suggestion that because
6 Plymouth Rock is not in contact with Avenge Digital,
7 rather, the -- the management entity, which apparently
8 handles marketing, the connection is between Plymouth
9 Rock and its own subsidiary management company which
10 hired Avenge Digital to do telemarketing.

11 And the fact that the -- that they didn't
12 intend to market to people in New Hampshire is, first
13 of all, a -- a proposition we'd want to challenge in
14 discovery, but it's also -- because they're affiliated
15 with Prudential, which does sell insurance nationwide,
16 but it's an incorrect sort of analysis of agency to say,
17 well, I hired someone to deliver pizza; I didn't hire
18 them to get into an accident while they were delivering
19 pizza. The question is is it within the scope of what
20 you were authorized to do and, in this case, it's
21 telemarketing.

22 More often than not in these cases people will
23 say, we have no connection with the entity that -- that
24 directed the call. But here, as a direct result of the
25 call, Mr. Clough wound up on the phone with Plymouth

1 Rock.

2 So it's not -- it's -- they're not unconnected
3 to this and that's one of the factors that the FCC has
4 cited in terms of saying, well, what -- what -- what
5 are the indicia of an agency relationship and the
6 ability to transfer calls directly to the principal
7 is -- supports -- supports agency, particularly at the
8 pleading standard.

9 Because this is -- these are facts that are
10 solely within the possession of the defendants. No
11 plaintiff could know all -- every in and out of the
12 contractual relationship. But these facts have time and
13 again been found sufficient to support a finding of
14 agency.

15 And, similarly, as to the -- the ATDS
16 allegation, there's a pause and a click and no plaintiff
17 could know anything more than that when they get an
18 illegal call.

19 So to hold the pleading standard to you have
20 to know the model and serial number of the dialing
21 system would essentially amount to judicial
22 nullification of the ATDS prohibition because they --
23 you -- you simply can't know that. And a well pleaded
24 allegation under *Iqbal* does not mean you have to
25 survive -- you could prevail on summary judgment at the

1 pleading stage. It's enough to state a plausible claim.

2 And there's really nothing else that could be
3 said about the -- it being an ATDS other than the pause
4 and the click, which is a telltale sign that you are
5 actually being called on a dialing system that is set up
6 so that the call center people pick up and don't have to
7 dial themselves.

8 But, again, that -- I think that they're
9 overstating what the -- what the pleading standard is
10 there in terms of establishing agency and, therefore,
11 personal jurisdiction.

12 THE COURT: Go ahead, Attorney Cacace.

13 MR. CACACE: Thank you, your Honor. Just
14 briefly.

15 I think most of what Mr. Broderick focused on
16 was not personal jurisdiction, but this agency question
17 which really is relevant to the second issue, the
18 12(b)(6) issue, the vicarious liability question. I
19 think he's sort of, you know, merging the two standards
20 here and I want to stay focused on the 12(b)(2)
21 standard, which is -- places the burden on the plaintiff
22 to present facts.

23 And most of the facts that Mr. Broderick
24 referenced, including the six -- the allegation that the
25 area code of the telephone number is 603 is not in the

1 record, it's not in the complaint, there's no affidavit
2 offered in support of it, and so the plaintiff just
3 simply haven't -- hasn't carried his burden on that
4 issue.

5 But even if he did, even if we knew that this
6 was a 603 number, this is a cell phone that we're
7 talking about and this is a New Jersey-focused marketing
8 campaign and folks are called because they enter their
9 information online on some third-party website saying
10 that they're interested in car insurance. And he
11 wouldn't have been called if he didn't say that, you
12 know, he was -- had this New Jersey address, which is
13 the address he gave on the call with Plymouth Rock.

14 And so when you look at the actual facts here,
15 this call had everything to do with New Jersey and
16 nothing to do with New Hampshire. The area code doesn't
17 change that. And we've cited a bunch of cases where
18 simply the area -- you know, simply calling an area code
19 doesn't create jurisdiction.

20 For example, there was one where there was a
21 hotel in Nevada, called someone who actually was from
22 California, but called them on their California cell
23 phone number while that person was at the hotel in
24 Nevada, and the Court held that there was no personal
25 jurisdiction in California just on the basis of this

1 area code.

2 There's a number of cases to that effect.
3 Really what the cases hold is that, you know, a person
4 has to be in -- you know, have -- the caller has to be
5 aware of the area code and the -- the person called has
6 to be in that -- in that state, present in that state at
7 the time.

8 I mean, you know, I think the Court can take
9 judicial notice of the fact that people move around with
10 their cell phones all the time. I had my Connecticut
11 cell phone in Massachusetts for 10 or 12 years and just
12 changed it not that long ago. But I don't think, you
13 know, a call to my 203 number would have subjected, you
14 know, somebody to personal jurisdiction in Connecticut
15 automatically from here in Massachusetts.

16 As for the agency issue, and I think we'll get
17 into this in the next -- the next section, but one point
18 that I wanted to make is that the -- the -- the contract
19 makes it clear that what -- if, in fact, an illegal call
20 was made that's outside of the scope of the agency here,
21 there's actually -- and I think we've cited this in our
22 reply brief -- there's a specific representation of
23 warranty made by Avenge that it would comply with and
24 not violate privacy and related laws like these. And I
25 can point you to that in a moment.

1 And then, finally, just the -- the ATDS, the
2 automatic dialing system, is not at issue here. We
3 just -- we haven't raised that. So I think that's --
4 that's just a distraction.

5 So, you know, at the end of the day -- and
6 I'll stop here -- plaintiff has not met his burden of
7 proof of establishing that New Hampshire has personal
8 jurisdiction over either defendant here.

9 THE COURT: Okay. This case seems like a case
10 that would be -- could use expedited discovery to get
11 past this pleading stage because the pleading stage is
12 obviously so favorable, frankly, to plaintiff's
13 allegations.

14 And I think here you've got two different
15 versions of what's gone on -- what's happened and at the
16 pleading stage, ultimately, I construe facts in favor of
17 jurisdiction. And I think there's just enough here to
18 satisfy this first hurdle, the pleading stage.

19 Plaintiff alleges that the defendants had
20 sufficient minimum contacts with New Hampshire and I've
21 jotted down just a few from the complaint. Avenge
22 Digital made or caused to be made the illegal
23 telemarketing calls at issue to be sent into this
24 district.

25 Plymouth Rock, in another part of the

1 complaint, offered its insurance services to the
2 plaintiff in this district, including by making
3 additional efforts to contact the plaintiff directly to
4 sell its services following the initial telemarketing
5 calls. That's the allegation.

6 At no point, according to the complaint, has
7 plaintiff sought out or solicited information regarding
8 Plymouth Rock's services.

9 And then, finally, at the end of January,
10 plaintiff alleges that plaintiff engaged the
11 telemarketer to learn their identity and the call
12 promoted Plymouth Rock's services and then the caller
13 attempted to sell the plaintiff an insurance policy for
14 Plymouth Rock.

15 Now, it seems to me that this at this early
16 stage satisfies the three elements of specific personal
17 jurisdiction.

18 First, plaintiff's claims are related to
19 New Hampshire because plaintiff alleges that they were
20 called in New Hampshire by New Hampshire numbers. This
21 case would not exist without those calls.

22 Second, defendant purposely availed themselves
23 of New Hampshire's laws by allegedly reaching out into
24 the state for sales and marketing purposes. Outreach
25 into the forum is voluntary and makes a potential

1 lawsuit foreseeable.

2 Third, subjecting defendants to personal
3 jurisdiction in this case is reasonable because the
4 Gestalt factors weigh in favor of efficient resolution
5 at this stage.

6 Defendants argue that Avenge Digital made
7 calls to a cell telephone that did not have a
8 New Hampshire area code and that Avenge Digital did not
9 know where plaintiff was located.

10 Defendants further argue that Avenge Digital's
11 market efforts were directed entirely toward New Jersey
12 and that plaintiff made proactive efforts to become
13 involved in the marketing campaign for the purposes of
14 this lawsuit.

15 However, these are, at this stage, disputed
16 facts and, thus, cannot be considered at this stage. At
17 a later stage, however, it may be appropriate to hear
18 these arguments and if the record bears out what
19 defendants are saying to hear this argument at a motion
20 for summary judgment stage.

21 And, additionally, with respect to the
22 vicarious liability, defendants argue that Plymouth Rock
23 is not subject to personal jurisdiction because the TCPA
24 violations did not arise out of Plymouth Rock's attempt
25 to contact the defendant, only an alleged robocall by

1 Avenge Digital, and I think plaintiff is correct that in
2 the First Circuit an agent's conduct may be attributed
3 to a principal for jurisdictional purposes.

4 And plaintiff alleges that Plymouth Rock
5 ratified Avenge Digital's call to a potential customer
6 and that Plymouth Rock accepted a transferred call from
7 Avenge Digital to discuss purchasing an insurance
8 policy.

9 While neither of these allegations are
10 connected to New Hampshire, they are sufficient, I
11 think, to create a potential agency relationship at this
12 early motion to dismiss stage. At a later stage, it may
13 be appropriate to deny plaintiff's claim at a motion for
14 summary judgment, but at this stage, I am going to
15 permit this claim to go forward.

16 I would be open to expedited scheduling,
17 expedited discovery, to try to get this -- if, in fact,
18 defendants are correct about these facts -- to get this
19 at a summary judgment stage on a faster track.

20 All right. I just want to clarify.
21 Defendant's not -- has, I think, stated in the pleadings
22 you're no longer pressing the argument that the TCPA
23 violates the First Amendment. That's the case?

24 MR. CACACE: Correct, your Honor. The Supreme
25 Court resolved that earlier this summer in a splintered

1 decision, but resolved it -- resolved the issue.

2 If I could, just respectfully, I do just want
3 to state for the record that I think the -- the Court's
4 ruling on that first issue sort of does flip the -- the
5 burden -- the burden of proof and the standard. It,
6 again, is not a pleading standard under 12(b)(2), it's
7 not a 12(b)(6) standard, and, you know, the plaintiff
8 does bear the burden of presenting evidence of
9 jurisdiction and I just don't think the plaintiff has
10 done that here.

11 But you've -- you've heard that from me
12 already.

13 THE COURT: I -- I agree I don't know how
14 they're going to get evidence until they do some basic
15 discovery. What they have now are they have alleged
16 facts in the complaint. And at this early stage, I
17 think it's sufficient to at least get to some discovery.

18 And if, in fact, it turns out in discovery
19 that you are correct, Attorney Cacace, I would be open
20 to entertaining an expedited schedule. And I tell
21 counsel that for your benefit -- benefit of all counsel.

22 Let's move now to this vicarious liability
23 argument, the 12(b)(6) standard.

24 Let me hear from Attorney Cacace.

25 MR. CACACE: Thank you, your Honor.

1 So the -- the first one is that there's
2 controlling legal authority here that supports vicarious
3 liability or that holds that vicarious liability is
4 available. Under the TCPA, the statute doesn't
5 expressly provide for vicarious liability. The Supreme
6 Court and the First Circuit have not directly addressed
7 it. The First Circuit certainly hasn't and the Supreme
8 Court hasn't -- (technical difficulties)

9 THE COURT REPORTER: I'm --

10 MR. CACACE: -- the case. They simply had, as
11 they put in the footnote, no cause to question -- I
12 think it was a footnote, but no cause to question the
13 Ninth Circuit's holding that vicarious liability was
14 available because it was not raised on appeal. The --
15 the Supreme Court simply didn't grant cert on that
16 question. It wasn't briefed and so they didn't address
17 it.

18 What the plaintiff relies on here is guidance
19 in an FCC declaratory ruling about how the common law of
20 agency might apply under the TCPA. And the *Dish Network*
21 case out of the DC circuit that we cited actually
22 dismisses a petition for review of that very declaratory
23 ruling because the guidance has "no binding effect on
24 courts," and as the DC circuit said, it is not entitled
25 to deference under *Chevron*. So its force is dependent

1 entirely on its power to persuade.

2 And we've cited several courts that have found
3 that that guidance is not persuasive. The *Murray vs.*
4 *Choice Energy* case out of the Southern District of Ohio,
5 *Bridgeview Healthcare vs. Clark* case out of the Northern
6 District of Illinois are two examples.

7 But even if vicarious liability is available
8 here, the allegations are not sufficient to state a
9 claim for vicarious liability against Plymouth Rock.
10 There's -- there's insufficient allegation of actual or
11 apparent authority or ratification. Actual authority
12 requires the mutual consent that the agent is acting on
13 behalf of and for the benefit of the principal and
14 critically subject to the principal's control.

15 There's just not enough specific factual
16 allegations here. I mean, the plaintiff alleges some
17 sort of formulaic sort of, you know, elements of -- of
18 agency law and says, well, you know, Plymouth Rock had
19 an interim control, whatever that means, doesn't
20 describe what that means, and doesn't actually, you
21 know, put any facts on that -- on the bones. You know,
22 you really just have sort of these bare elements of
23 what, you know -- of agency law without any facts to
24 establish what that interim control is or might be.

25 And if you look at the -- the contract,

1 the contract that we submitted, you know, which is
2 incorporated into -- into the complaint here, it -- I
3 mean, it says, you know, that there is no agency
4 relationship here, it's an independent contractor
5 relationship, and it makes clear that Avenge Digital
6 made a representation that it is -- it will not violate
7 any privacy laws, which would include -- wouldn't
8 violate any applicable laws of regulations, including,
9 without limitation, privacy and deceptive trade
10 practices laws.

11 Plymouth Rock did everything that -- it
12 wasn't -- (technical difficulties)

13 THE COURT REPORTER: I'm sorry. You cut out,
14 Attorney Cacace. I'm sorry.

15 MR. CACACE: Did I just -- just cut out, just
16 now?

17 THE COURT REPORTER: Just for a second, yes.

18 MR. CACACE: So Plymouth Rock did everything
19 that it could to ensure its agent -- or, sorry, that its
20 counterparty to the contract was not going to violate
21 the TCPA or any related law.

22 The level of control here -- there just simply
23 isn't any allegation -- if you look at the cases that
24 we've cited, the level of control that's required is,
25 you know, the -- the principal has control over the --

1 who is called, when they're called, the contents of
2 what's -- what's delivered, the timing of the calls, the
3 recipients. None of that -- there's no allegation
4 that -- that Plymouth Rock controlled any of that.

5 What -- the allegation is that a call was made
6 and that it ended up getting transferred to Plymouth
7 Rock. That -- that is not enough to establish control
8 over the calls being made here.

9 So that's actual authority. Apparent
10 authority requires something said or done by the
11 principal, which would be Plymouth Rock here, on which
12 the third person reasonably relied. And there's just --
13 there's simply no allegation here that Plymouth Rock
14 said anything on which the plaintiff relied to believe
15 that Avenge had apparent authority here.

16 And the same thing with ratification. The
17 ratification requires manifestation of assent to the
18 particular conduct here, not -- not, you know, just
19 making calls, but making calls in a way that allegedly
20 violates the TCPA. There's no ratification by Plymouth
21 Rock of that. There's no facts in support. It's really
22 just, you know, formulaic assertions of control and the
23 like.

24 And the only real specifics are -- really are
25 irrelevant to vicarious liability. I mean, the

1 plaintiff alleges that Plymouth Rock had absolute
2 control over whether and under what circumstances it
3 would accept a customer. Accepting a customer is
4 different than making calls.

5 It also had allegedly had -- gave interim
6 construction -- sorry -- interim instructions by
7 providing the volume of calling and leads that it would
8 purchase. Again, that has nothing to do -- volume of
9 calling has nothing to do with who you're going to call
10 and where those -- those folks are located and how the
11 calling is going to be -- going to be made, how the
12 calling's going to be done. So there's really nothing
13 about Plymouth Rock's control over Avenge Digital's
14 alleged actions.

15 As far as Plymouth Rock knowing or, you know,
16 should have known that Avenge Digital was violating --
17 allegedly violating the TCPA, the allegation is that
18 Plymouth Rock previously received complaints about
19 telemarketing conduct of its unidentified third party
20 vendors, but it doesn't say that any of those third
21 party vendors was Avenge Digital.

22 As to Avenge Digital, the allegation is that
23 it had previously been sued for TCPA violations, but
24 there's no allegation as to what the outcome of that
25 suit was or even if Plymouth Rock was aware of it.

1 And so there's a Seventh Circuit case that we
2 cite on this that I think is very helpful here. It's
3 from -- it's recent. It's from this year. I guess it's
4 *Warciak vs. Subway Restaurants*. And in that case, the
5 Seventh Circuit held a contract between two entities,
6 which is all we have here, a contract between Plymouth
7 Rock and Avenge Digital, is not enough, where in that
8 case T-Mobile maintained control over the content,
9 timing, and recipients of what was a text message
10 campaign there.

11 That's not enough. There's no allegations
12 that Subway manifested the -- you know, T-Mobile was its
13 agent, and it's the same here. There's just not enough
14 allegation of the control over the content, timing, or
15 recipients of the phone calls here and the allegations
16 fail as to vicarious liability.

17 THE COURT: Attorney Broderick.

18 MR. BRODERICK: Well, I -- to address that
19 Seventh Circuit case right off, it's a -- it's a --
20 frankly, I think it's a deviation from other Seventh
21 Circuit cases holding that vicarious liability does
22 attach under the TCPA and accepting that agency is a
23 particularly low bar in terms of the allegations that
24 one has to make in order to state a plausible claim of
25 agency.

1 The other thing about the *Warciak* case is the
2 agency finding is essentially dicta because there was a
3 wireless carrier exemption in that T-Mobile didn't
4 charge its customer and that is expressly exempt under
5 the TCPA. So there was an entirely dispositive and
6 independent ground to find that the complaint did not --
7 did not state a claim for relief.

8 And the -- the cases that we cited, including
9 Judge Barbadoro's decision in the *Revenue Frontier* case,
10 there is vicarious liability under the TCPA and the
11 Supreme Court -- the interpretation of the Supreme
12 Court, what the defendant dismisses as dicta, is
13 actually an affirmation that vicarious liability is
14 available under the TCPA and that's how the courts that
15 we cited, including Judge Gorton in the *Rosenberg vs.*
16 *LoanDepot* case, that was the understanding that other
17 judges had of the Supreme Court's -- (technical
18 difficulties)

19 THE COURT REPORTER: I'm sorry. Excuse me. I
20 don't know if it's my connection, but you cut out a
21 little bit, too.

22 MR. BRODERICK: I did?

23 THE COURT REPORTER: Yes, just a little bit.
24 You said, the understanding that other judges had of the
25 Supreme Court's -- and that's where you cut out a little

1 bit.

2 MR. BRODERICK: Of the Supreme Court's comment
3 that they had no reason to question the Ninth Circuit's
4 holding that vicarious liability is available under the
5 TCPA.

6 So, you know, it -- in that the -- Plymouth
7 Rock can be held, you know, to personal jurisdiction in
8 New Hampshire, this -- the -- their potentially
9 vicariously liability for the same reasons, because we
10 plausibly stated a claim of an agency relationship which
11 necessarily supports imputation of that agent's contacts
12 with New Hampshire to them.

13 And by the same token, because we've stated a
14 claim of agency, we've stated a claim that they can be
15 vicariously liable. The only real -- and I don't think
16 it has a lot of force, but the only way you could find
17 that -- that we haven't stated an agency claim is if
18 there's no agency available under the TCPA, which, given
19 the really large volume of vicarious liability cases and
20 what -- just contradicts that notion.

21 And we're not only relying on the FCC's
22 guidance. These are courts adopting and applying a
23 common law of agency standard largely based on the
24 restatement of agency. And under those principles,
25 there is -- we've stated both actual authority, apparent

1 authority, and ratification in that they got on the
2 phone with Mr. Clough and offered him -- offered him
3 insurance.

4 And I guess I'd add to that that it is not
5 just a -- if you knew -- if it knew or should have known
6 standard and the level of control is not that you're
7 remotely pushing the buttons for your agent. You have
8 an agency relationship, they're authorized to
9 telemarket, and you're -- you're on the hook for the
10 good and the bad and contractual terms alone are not --
11 are not at all dispositive because you can say you're an
12 independent contractor and still be found to be an
13 agent. And you can warn somebody, don't violate the
14 TCPA, but you're not allowed to sort of give a wink and
15 a nod that they are, in fact, violating the TCPA.

16 So we're -- but, again, we're only talking
17 about the pleading standard here and we think we've
18 cleared that bar.

19 THE COURT: Attorney Cacace, anything further?

20 MR. CACACE: No, your Honor. I think just two
21 quick things.

22 First, all of the cases that -- finding or
23 holding that there is vicarious liability, you know,
24 sort of rely on -- would link back to the FCC guidance,
25 but in terms of the substance of it, again, there's --

1 there is a higher degree of control -- a higher level of
2 control that would be required here to establish
3 vicarious liability and it would be control over the
4 content, timing, and the recipients of these calls. And
5 there's no allegation that Plymouth Rock did that. The
6 allegation is that they received calls transferred to
7 them.

8 THE COURT: Okay. Perhaps no surprise, I'm
9 going to follow Judge Gorton, Judge Barbadoro, and find
10 there is vicarious liability under the TCPA. And I
11 thought the *Rosenberg* case, as well as Judge Barbadoro's
12 reasoning in *Revenue Frontier* were persuasive to me.

13 Obviously I'm following the *Campbell-Ewald vs.*
14 *Gomez* case as well, which obviously noted that the Ninth
15 Circuit had deferred to that FCC ruling and they had no
16 cause to question it.

17 So based upon that, I find that a party who
18 engages in a third-party telemarketer -- who engages a
19 third-party telemarketer may be held vicariously liable
20 under federal common law agency principles for a TCPA
21 violation.

22 Now, I'm looking again at this complaint and,
23 again, I'm looking -- construing it favorably to
24 plaintiff. And ultimately plaintiff alleges that
25 Plymouth Rock is vicariously liable for the unauthorized

1 actions of Avenge Digital in several pieces of
2 complaint.

3 The complaint alleges Avenge Digital has a
4 network of calling centers that it uses to engage in
5 telemarketing of insurance services. The complaint
6 alleges Avenge Digital was contractually required to
7 promote Plymouth Rock products on their telemarketing
8 calls in order to potentially generate new customers and
9 they did so as they did with plaintiff here.

10 The complaint alleges Plymouth Rock knew that
11 Avenge Digital was making automated telemarketing calls
12 and alleges Plymouth Rock was knowingly and actively
13 accepting the business that originated through the
14 illegal telemarketing calls through the issuance of the
15 insurance policies.

16 I think at this stage plaintiff has alleged
17 sufficient facts to show that Plymouth Rock may have had
18 express or apparent authority over Avenge Digital.
19 Again, minimally sufficient at this stage.

20 Defendants argue that the TCPA does not
21 expressly provide for vicarious liability and that the
22 FCC finding is not binding on this court. Those two
23 statements are correct, but they're insufficient at this
24 stage to justify me dismissing the claim under 12(b)(6).

25 I'm construing all reasonable inferences in

1 plaintiff's favor and I think it's facially plausible
2 that Plymouth Rock had actual or apparent authority over
3 Avenge Digital.

4 Now, defendants argue that the complaint
5 merely alleges that Plymouth Rock hired Avenge Digital
6 to promote Plymouth Rock's products via telemarketing
7 calls and that Plymouth Rock accepted business that
8 originated from the calls. Well, in fact, plaintiff
9 also alleges, though, that Plymouth Rock knew of Avenge
10 Digital's conduct in violation of the TCPA.

11 There are -- there is case law, as Attorney
12 Cacace points out, where TCPA complaints were dismissed
13 for failure to allege sufficient facts. *Warciak* is one.
14 However, here, I believe this complaint alleges slightly
15 more facts than a simple contract between the parties.
16 And while not all contracts form an agency relationship,
17 I think it is possible that the contract between
18 Plymouth Rock and Avenge Digital created an agency. We
19 don't know at this stage, but it's plausibly alleged.

20 In short, Plymouth Rock may be vicariously
21 liable for Avenge Digital's call to plaintiff in
22 New Hampshire on a New Hampshire cell phone.

23 Those are my findings with respect to the
24 12(b)(2) and the 12(b)(6) motions at this stage.

25 I find, in conclusion, plaintiff has made a

1 prima facie showing that this Court has specific
2 jurisdiction over defendants. Plaintiff has also shown
3 that Plymouth Rock may be vicariously liable for the
4 actions of Avenge Digital. Accordingly, I dismiss -- I
5 deny defendant's motion to dismiss under Rule 12(b)(2)
6 and 12(b)(6).

7 I do not comment at all in any way, shape, or
8 form, on the facts and whether or not the facts will
9 support these allegations. And as I've said, I'm open
10 to an expedited discovery schedule to try to have the --
11 the issues. If, in fact, defendants are correct, they
12 will bear those out in discovery and I'm open to a joint
13 proposal from counsel with respect to a discovery
14 schedule. If there are any discovery disputes and you
15 need some help resolving them, I'd happy to do that for
16 you quickly, informally.

17 But in the meantime, if you would like to
18 propose an expedited schedule, I certainly would be open
19 to that to try to have these issues resolved. It
20 doesn't seem as though it would take voluminous amounts
21 of discovery to do that based on what I'm hearing,
22 but --

23 MR. CACACE: And, your Honor -- you're
24 suggesting that that would be focused both on personal
25 jurisdiction and vicarious liability?

1 THE COURT: Yes.

2 So if, in fact, you can reach an agreement on
3 some sort of expedited schedule, I'd be interested in
4 that. And then if it moves past summary judgment, we'll
5 talk about some sort of trial and I'll be open to
6 creative resolution at that stage as well. So in terms
7 of the pandemic and where it's going, it doesn't look --
8 it doesn't look like it's going away.

9 So, in any event, please meet and confer and
10 talk about discovery and see if it can't be done or
11 proposed on an expedited basis.

12 Anything further to discuss with me before we
13 move along? And I know that -- I know that there has
14 been a proposed discovery schedule filed already. I'm
15 suggesting that perhaps there's a way to resolve this
16 case on a more expedited basis. It seems as though it's
17 a finite universe of facts.

18 So anything further before I adjourn?

19 MR. CACACE: I don't think so, your Honor.

20 MR. BRODERICK: No, your Honor. Thank you.

21 THE COURT: All right. It's very nice to have
22 you here and very nice to see you. I hope you all
23 remain safe.

24 MR. BRODERICK: Yes, likewise, your Honor.

25 MR. CACACE: Same to you, your Honor.

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MR. PHILLIPS: You also.

THE COURT: Take care.

MR. BRODERICK: Okay. Take care. Thank you.

(Proceedings concluded at 10:24 a.m.)

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 11/2/2020

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR